
In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1229

A-OK MOTOR LINES, INC. (SAMUEL KAUFMAN,
TRUSTEE IN BANKRUPTCY),

Petitioner,

vs.

NORTH ALABAMA EXPRESS, INC., ET AL.,

Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF DISCUSSING NEW ICC DECISION IN THIS CASE

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This proceeding seeks review of a decision of the Court of Appeals, Fifth Circuit, which reversed and remanded an order of the Interstate Commerce Commission (ICC). On page 5 (n. 7) of the petition for writ of certiorari it was explained that "the ICC has withheld further proceedings pending final disposition of the court proceedings." That statement is no longer accurate. On March 12, 1979 counsel for petitioner received a further decision by the ICC in this proceeding.¹ A copy of this decision, dated February 5, 1979, and mailed March 5, 1979, is attached as Appendix D.

1. Counsel, on that date, sent by express mail a letter to the Clerk reporting the issuance of such decision. It was suggested by the Clerk that this Supplemental Brief would be appropriate under Rule 24.5.

This new decision, scheduled to become effective April 4, 1979,² purports to comply with the mandate of the Court of Appeals.

The ICC's action in implementation of the court's mandate makes it all the more imperative that this Court review the decision of the Court of Appeals in this proceeding.

Following the July 17, 1978 decision of the Court of Appeals, the ICC, *sua sponte*, entered decisions, dated August 21, 1978, designed to comply with the court's decision, which required the Commission's Division 3 to enter an order *dismissing* these proceedings. Since the August 21 action by the ICC was taken prior to the issuance of the court's mandate and prior to the disposition of the petition seeking rehearing before such court, petitioner filed appropriate pleadings with the ICC requesting (1) a stay of the August 21 decisions and (2) an extension of time in which to file a petition for reconsideration of such decisions. The ICC granted the stay but required petitioner to proceed with the filing of its petition for reconsideration. Petitioner understood that the ICC would then take no further action while this proceeding was pending before this Court.³

The ICC was promptly notified of the November 6 decision of the Court of Appeals, modifying its July 17 decision. In its recent decision, however, the ICC has taken the position that the court's November 6 modification was of no significance. As a result of this interpretation,

2. Petitioner is filing a request with the ICC to postpone the effective date of such order, pending disposition of this proceeding before this Court.

3. The ICC has explained the issuance of its latest decision by stating that it is "not at liberty to postpone any further our compliance with the mandate of the Fifth Circuit." (Appendix D, p. 14).

the Commission has reinstated its decisions of August 21 *dismissing* these proceedings in compliance with the court's July 17 ruling.

The ICC has correctly noted that the "controlling issue" in the court's decision was the conclusion that the Commission's Division 3 "lacked authority" to enter its findings that public convenience and necessity required the issuance of certificates to the bankrupt carrier's successors. The ICC's discussion of this issue points up a significant error in the court's decision. The ICC stated:

"The Court concluded that as a result of the Alabama Public Service Commission's cancellation of A-OK's intrastate authority, no interstate authority under a certificate of registration could survive." (Appendix D, p. 13).

The fact is, however, that the ICC entered its final order approving the issuance of interstate authority to A-OK's successors several months *prior* to the cancellation by the state commission of A-OK's intrastate authority. The ICC is here recognizing that, under the court's decision, the *subsequent* Alabama Public Service Commission order cancelling A-OK's intrastate rights invalidated the purely interstate authority *previously* granted by the ICC (based upon its findings that PCN required the continuation of interstate operations).

This demonstrates that the court's decision stands for the proposition that a state regulatory commission can nullify and cause to be set aside a finding by the ICC, under §207⁴ of the Interstate Commerce Act, that purely interstate operations are needed in the public interest.

4. As explained in the petition (n. 3), statutory references are to the Interstate Commerce Act in effect at the time of the court's decision.

Petitioner also invites the Court's attention to the following findings in the ICC's decision:

"We have sympathy with the Trustee's request that the Commission, if it must⁵ dismiss all the present applications, at least restore the vendor's Certificate of Registration. Such Certificate was surrendered voluntarily pursuant to the earlier August 12, 1976, decision of Division 3. However this certificate cannot be reissued to vendor because the underlying intrastate authority upon which it was based has been cancelled. The Court's decision in this case emphasizes that registered authority cannot exist without concurrent underlying intrastate single-state authority. Section 206(a)(7)(A) of the Interstate Commerce Act, 49 U.S.C. Section 10932(b)(3), formerly contained in 49 U.S.C. Section 306(a)(7)(A)." (Appendix D, p. 14).

In implementation of the court's decision, the ICC is now holding that *because* the Trustee in Bankruptcy complied fully with the ICC's order, the trustee has thereby lost forever the only major asset owned by the bankrupt. In setting aside its grant of authority to A-OK's successors, the ICC has now held that the state commission has rendered the ICC powerless to reinstate the status quo that existed prior to the entry of the invalidated order. Accordingly, *because* the trustee complied with the ICC's order,⁶

5. The sole purpose of the court's November 6 decision was to eliminate its original requirement that the ICC "must" dismiss such applications.

6. The trustee acted pursuant to an order of the Bankruptcy Court. Such order, in turn, was issued for the purpose of complying with the conditions prescribed by the ICC (Petition, pp. 7-8). Invalidation of the ICC's order should leave the parties in the position they were in immediately prior to entry of such order. This would then enable the trustee to recontract for the sale of the bankrupt's operating authority under conditions that would be fully consistent with the court's decision and acceptable to all parties.

the ICC now says that the trustee *thereby* lost all of its operating authority. Under this decision, neither A-OK nor A-OK's successors will be authorized to continue the common carrier interstate services that have been maintained continuously for several decades.⁷ This unconscionable result is directly attributable to the errors of the Court of Appeals, as set forth in the petition.

The rendition of this new decision of the ICC makes it even more imperative that this Court review the decision of the Court of Appeals. Otherwise, the ICC will no longer be able to exercise the "exclusive and plenary" jurisdiction conferred upon it by § 5(12) of the Interstate Commerce Act, as recognized by this Court in *County of Marin* (Petition, pp. 12-14). No longer will each division of the ICC be authorized to "hear and determine" all matters referred to it by the Commission or exercise in regard thereto "all the jurisdiction and powers conferred by law upon the Commission," as expressly provided by § 17(4) of the statute.

Respectfully submitted,

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Date: March 16, 1979

7. The ICC's findings of PCN, based upon the testimony of 62 shippers and 5 connecting motor carriers, are thereby nullified—all as the result of the court's holding that the state commission's decision (dealing only with local, intrastate matters) was controlling.

APPENDIX**APPENDIX D****INTERSTATE COMMERCE COMMISSION****DECISION**No. MC-F-11133¹

**RELIABLE TRUCK LINES, INC.-PURCHASE
(PORTION)-A-OK MOTOR LINES, INC. (SAMUEL
KAUFMAN, TRUSTEE IN BANKRUPTCY)**

DECIDED February 9, 1979

These applications were originally approved and authorized by a report and order of the Commission's Division 3 entered August 12, 1976.

By a decision of the entire Commission on August 21, 1978, and served August 28, 1978 the proceeding was reopened and assigned to Division 3 for disposition in accordance with the opinion of the U.S. Court of Appeals for the Fifth Circuit in *North Alabama Express, Inc., Et Al. v. United States, Et Al.*, No. 77-1341 (reported at 576 F. 2d 679).

1. This proceeding also embraces Docket Nos. MC-128944 (Sub-No. 9), *Reliable Truck Lines, Inc., Extension-Alabama*; MC-F-11134, *Cooper Transfer Co., Inc.-Purchase (Portion)-A-OK Motor Lines, Inc. (Samuel Kaufman, Trustee in Bankruptcy)*; MC-55889 (Sub-No. 39), *Cooper Transfer Co., Inc., Extension-Alabama*; MC-F-11143, *Gordons Transports, Inc.-Purchase (Portion)-A-OK Motor Lines, Inc. (Samuel Kaufman, Trustee in Bankruptcy)*; MC-11220 (Sub-No. 123), *Gordons Transports, Inc., Extension-Alabama*; MC-F-11150, *The Mason and Dixon Lines, Inc., Purchase (Portion)-A-OK Motor Lines, Inc. (Samuel Kaufman, Trustee in Bankruptcy)*; and MC-59583 (Sub-No. 130), *The Mason and Dixon Lines, Inc., Extension-Alabama*.

By a concurrent decision entered August 21, 1978 and served August 28, 1978, Division 3 dismissed the Section 5(2) and "directly related" Section 207 applications without prejudice to applicants' filing appropriate new applications for corresponding temporary and/or permanent operating authority under Section 210a(a) and 207 of the Act. Both decisions were entered to comply with the July 17, 1978 opinion of the U.S. Court of Appeals for the Fifth Circuit in *North Alabama Express, Inc., Et Al. v. United States, Et Al.*, No. 77-1341. That decision stated that certificates of registration can not be transferred if the underlying intrastate certificates had been cancelled. Accordingly, Division 3 had no authority under the Commission's own organizational structure at that time to consider the Section 207 applications since they were not "directly related" to a valid proposal under Section 5(2) - the only circumstance under which Division 3 could consider Section 207 applications.

On August 30, 1978, A-OK Motor Lines, Inc. (Samuel Kaufman, Trustee in Bankruptcy) (Trustee) filed before the Court a petition for rehearing.

On September 19, 1978, the Commission, by Chairman O'Neal, entered a decision postponing the effective dates of the earlier decisions entered August 21, 1978, and served August 28, 1978, until 15 days after issuance of the Court's mandate. Chairman O'Neal's decision also maintained the existing due dates for the filing of petitions for reconsideration and replies relative to the August 21, decision. The parties were advised that a decision on such petitions would be held in abeyance until the petition for rehearing for the court was decided and its mandate issued.

On November 6, 1978, the Court denied the petition for rehearing, and it issued its mandate on November 14, 1978. Accordingly, the August 21, 1978 decisions were due to become effective on November 29, 1978.

However, on November 22, 1978, the Commission, by Chairman O'Neal, entered a decision, served November 28, 1978, further postponing the effective dates of the decisions of August 21. The effective date was suspended pending disposition of a petition by the Trustee, filed November 20, 1978, seeking implementation of the November 6, 1978, mandate of the United States Court of Appeals. This decision also preserved the right of AAA Cooper Transportation (ACT) and Mason & Dixon Lines Incorporated (M&D) to renew their requests for further postponement of the effective dates of the August 21 decisions, following disposition by the Commission of the Trustee's November 20 filed petition, described below. (These carriers will seek further postponement, if needed to carry on existing operations until their section 210a(a) temporary authority applications, prompted by the Court's decision, are decided.)

A number of pleadings have been filed by the parties and have been disposed of by the above-described decisions of September 19 and November 22 as well as by a Notice to the Parties, entered September 25, 1978, and served October 13, 1978. The following petitions remain and will be discussed:

By petition filed September 27, 1978, vendor's Trustee seeks reconsideration of the decisions of the entire Commission and of Division 3, entered August 21, 1978, and served August 28, 1978. On October 11, 1978, Bee-Line Express, Inc., Bowman Transportation, Inc., Floyd & Beasley Transfer Company, Inc., Georgia-Florida-Alabama Transportation Company and North Alabama Express, Inc., filed a joint reply.

By petition filed November 20, 1978, the Trustee seeks implementation by the Commission of the November 6,

1978, decision of the United States Court of Appeals which modified the earlier decision of that Court entered July 17, 1978. On November 24, 1978, the parties which filed the above-noted reply of October 11, 1978, also filed a motion to strike and a new reply to the petition of November 20th. The Trustee also has filed a reply to the motion to strike.

The contentions of the Trustee presented in the September 27th filed petition are twofold: (1) that the August 21 decisions of the Commission and of the Commission, Division 3 were inappropriate inasmuch as the Court had not yet issued its mandate; and (2) that in any event the decision of Division 3 dismissing the applications in these proceedings improperly failed to restore to the Trustee its Certificate of Registration and Certificates of intrastate operating rights in existence prior to the earlier decision of Division 3, entered August 12, 1976 (reported at 122 M.C.C. 501). These Certificates were surrendered respectively to the Commission and to the Alabama Public Utilities Commission in reliance on and in specific compliance with the Commission's order of August 12, 1976.

The contentions of the Trustee presented in the November 20, 1978, petition seeking implementation, essentially are grounded on its belief that the November 6 order of the Court effected a substantial modification of the Court's July 17 decision. That order substituted the following language:

"The case is now remanded to the Interstate Commerce Commission with instructions that Division 3's order now under review be vacated and set aside (footnote). Such action is without prejudice to further proceedings not inconsistent with this opinion." (The Court's footnote made specific reference to the restructuring

by the Commission of its divisions (42 FR 65181 (December 30, 1977)), providing for two divisions with concurrent general jurisdiction.)

for this language in the prior decision:

"Division 3's order now under review is due to be vacated and set aside and the case remanded to the Interstate Commerce Commission for dismissal by that division. Such action is without prejudice to consideration of appropriate PC&N applications by Division 1 of the Commission."

The Trustee claims that the Court's decision as modified simply directs the Commission to vacate and set aside the order of Division 3, entered August 12, 1976, and does not require dismissal of the entire proceeding, but rather would permit the Commission to continue processing the "related" Section 207 applications as "unrelated" independent Section 207 applications following appropriate republication of notice. Accordingly, the Trustee requests that the August 21 dated decisions of the Commission be withdrawn as they apply only to implementation of the Court's decision of July 17, 1978, prior to modification. He also asks the Commission to temporarily withhold any further action pending disposition of a petition seeking a writ of certiorari to be filed with the United States Supreme Court to review the above-decisions of the Court of Appeals. However, the trustee argues, if such action is not withheld, the Commission should proceed (1) to vacate and set aside Division 3's decision of August 12, 1976; (2) restore to the Trustee vendor's Certificate of Registration; and (3) process the PC&N applications in this proceeding as independent Section 207 applications rather than as applications under Section 207 directly related to section 5 proceedings,

following notice to this effect in the Federal Register and the submission of additional evidence.

Protestants' joint replies and motion to strike generally support Commission action taken subsequent to the Court's decision. They urge denials of the Trustee's petitions or alternately, denial of the first and striking of the second. As indicated below, there is no compelling reason for granting the motion to strike.

DISCUSSION AND CONCLUSIONS

The Trustee's petitions raise interrelated issues and, for the most part, will be discussed together. However, the initial contention in the first petition that entry of the Commission's August 21 decisions was premature is now mooted. By Chairman O'Neal's decision of October 19, 1978, the decisions of August 21 were not to become effective before the Court's mandate was finally issued.² The time frame for filing of petitions for reconsideration and replies was left unchanged to effect expeditious disposition of this case in accordance with the Court's judgment.

In our opinion, the Court's subsequent November 6, 1978 order, did not effect a substantial change in its earlier opinion as would require or justify withdrawal or alteration of the August 21 decisions. It is true that the Court's ultimate decision remanding the case to the Commission does not expressly require dismissal of the proceedings. The Commission was charged only with vacating and setting aside the order of Division 3, entered August 12, 1976 "without prejudice to further proceedings not inconsistent with this opinion."

2. The decisions are yet to be effective as a result of decision of the Commission, by Chairman O'Neal, dated November 22, 1978 extending the effective date.

However, the controlling issue in the Court's decision was whether (former) Division 3 had authority to approve a "directly-related" Section 207 application, when it was no longer related to a Section 5(2) proceeding. The Court concluded that as a result of the Alabama Public Service Commission's cancellation of A-OK's intrastate authority, no interstate authority under a certificate of registration could survive. Hence there were no property rights to transfer under Section 5(2) and without a viable Section 5(2) application to decide, Division 3 exceeded its authority in deciding the assertedly "directly related" Section 207 applications (576 F. 2d 679 at 686).

Thus although the November 6 order eliminated the specific directive of "dismissal (of the case) by that Division (Division 3)" and directed the Commission to vacate and set aside that Division's order of August 12, 1976, the Court's decision, even as slightly modified, leaves the Commission with no choice but to dismiss the Section 5(2) applications.

Clearly, however, that Court was primarily concerned with the Commission's new Organization Minutes referred to in the above-described footnote. But the prior specific order could be, and, in fact, was accommodated by the Commission through Delegation to Division 3, 49 C.F.R. 1011.2 (a) (6) (B) and 49 C.F.R. 1011.3(h). See our decision of August 21, 1978, in these proceedings.

Although Division 3's decision of August 12, 1976, was implicitly vacated and set aside by its later decision of August 21, 1978, dismissing these proceedings, our decision herein shall expressly vacate and set aside the August 12 in keeping with the Court's express instructions. Beyond that, the Court's judgment directs the Commission to act in a manner "not inconsistent with this opinion". This is exactly what it has done.

The Court's judgment does give the Commission some flexibility as to the timing and manner of disposition of the "directly-related" Section 207 applications. Thus the Commission could entertain a request to treat the Section 207 applications as new (independent) Section 207 applications, republish them as such, and set the matter for further hearing. But no Section 207 applicant has made such a request. Moreover the record is quite stale and we believe that the matter can best be handled in new Section 207 proceedings.

We have sympathy with the Trustee's request that the Commission, if it must dismiss all the present applications, at least restore the vendor's Certificate of Registration. Such Certificate was surrendered voluntarily pursuant to the earlier August 12, 1976, decision of Division 3. However this certificate cannot be reissued to vendor because the underlying intrastate authority upon which it was based has been cancelled. The Court's decision in this case emphasizes that registered authority cannot exist without concurrent underlying intrastate single-state authority. Section 206(a)(7)(A) of the Interstate Commerce Act, 49 U.S.C. Section 10932(b)(3), formerly contained in 49 U.S.C. Section 306(a)(7)(A).

We also note the Trustee's request that the Commission defer action until it files a petition for certiorari and the Supreme Court disposes of it. However, we are not at liberty to postpone any further our compliance with the mandate of the Fifth Circuit. The petitions of the Trustee filed September 27, 1978 and November 20, 1978, are denied.

The motion to strike, buttressed on the alleged lack of standing of the Trustee to prosecute the existing applications under section 207(a), is rendered moot in the light of our disposition of his pleadings.

It is ordered:

1. The petition of A-OK Motor Lines, Inc. (Samuel Kaufman, Trustee in Bankruptcy), filed September 27, 1978, for reconsideration of the decisions of the entire Commission and of the Commission, Division 3 each entered August 21, 1978, is denied.

2. The petition of A-OK Motor Lines, Inc. (Samuel Kaufman, Trustee in Bankruptcy), filed November 20, 1978, seeking implementation of the November 6, 1978, decision of the United States Court of Appeals is denied.

3. The joint motion of Bee Line Express, Inc., Bowman Transportation, Inc., Floyd & Beasley Transfer Company, Inc., Georgia-Florida-Alabama Transportation Company, Hiller Truck Lines, Inc., and North Alabama Express, Inc., filed November 24, 1978, to strike the petition in (2) above, is dismissed as moot.

4. The decision of the Commission, Division 3, entered August 12, 1976, is vacated and set aside.

5. This decision and the decisions of the entire Commission and Division 3 each entered August 21, 1978, shall become effective 30 days from the service date of this decision.

By the Commission, Chairman O'Neal, Vice Chairman Brown, Commissioners Stafford, Gresham, Clapp, and Christian. Vice Chairman Brown absent and not participating.

H. G. HOMME, JR.,
Secretary

(Seal)